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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN WESLEY HOWARD, Appellant.	2 CA-CR 2008-0209 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200700800

Honorable James L. Conlogue, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant John Howard was convicted of driving with a drug or its metabolite in his body while his license was suspended, possessing drug paraphernalia, and possessing less than two pounds of marijuana. The trial court sentenced him to concurrent, presumptive terms of imprisonment on each count: three years each for possession of marijuana and drug paraphernalia, and 4.5 years for driving with a drug or its metabolite in his body. He argues on appeal the court erred when it admitted evidence Howard had been arrested previously for marijuana possession.

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. Gurrola*, 219 Ariz. 438, n.1, 199 P.3d 693, 694 n.1 (App. 2008). An Arizona Department of Public Safety officer stopped Howard's vehicle for having an illegible license plate. Five people were in the vehicle. When the passenger rolled down the window, the officer smelled a strong odor of alcohol. He asked Howard, who had been driving, to get out of the vehicle. The officer asked Howard several times to remove his hands from his pockets, but Howard refused to comply. Howard did, however, consent to a pat-down search for weapons. The officer felt a bulge in Howard's left front pocket and asked permission to remove the item; Howard consented. The item was a rolled-up piece of paper with marijuana inside. Howard said he had found the piece of paper on the ground. When the officer searched the vehicle, he found a marijuana "bud" on the back seat and some "cigar rolled marijuana cigarette[s]," known as "blunts" in the ashtray of the vehicle and in a cigarette package.

¶3 An officer interviewed Howard later at the police station. Howard maintained that he had found the marijuana that was in his pocket on the ground and "when he picked it up, he looked at it and said it was his lucky day." He admitted the paper had contained about "five to six grams" of marijuana but that he had smoked some of it. He also told the officer he used marijuana daily to relax and admitted knowing about one of the "blunts" in the ashtray.

¶4 Howard showed no signs of impairment on the field sobriety tests he performed. But he displayed other "indicators of ingestion of marijuana" such as eyelid tremors and bloodshot, watery eyes. Howard consented to give a urine sample, which tested positive for tetrahydrocannabinol (THC), a chemical found in marijuana.

¶5 The jury convicted Howard of possession of marijuana but found, using a special verdict form, that Howard had only possessed the marijuana found in his pocket and not the "bud" or the "blunts" found in the vehicle. It also convicted him of possession of drug paraphernalia and driving with a drug or its metabolite in his body while his license was suspended. After being sentenced by the trial court, Howard filed a timely notice of appeal.[1]

¶6 Howard argues the trial court erroneously admitted evidence of his prior marijuana arrest pursuant to Rule 404(b), Ariz. R. Evid., and Rule 403, Ariz. R. Evid. We generally review the trial court's admission of other-act evidence under Rule 404(b) for an

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[1]Although Howard technically only appealed his sentences in his notice of appeal and not the underlying convictions, the notice was sufficient to vest jurisdiction in this court to consider any error in the sentences, and in doing so, we may address the validity of the underlying convictions. *See State v. Smith*, 171 Ariz. 501, 504, 831 P.2d 877, 880 (App. 1992).

abuse of discretion. *See State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007). He specifically argues the evidence was not admitted for one of the proper purposes set forth in Rule 404(b) and that the court failed to find by clear and convincing evidence the prior arrest had occurred.

¶7 However, even were we to assume that the trial court had committed error in one of the foregoing ways, the record demonstrates that any such error was harmless. *See State v. Wallace*, 219 Ariz. 1, ¶ 20, 191 P.3d 164, 168 (2008) (state has burden to show "'beyond a reasonable doubt that the error did not contribute to or affect the verdict'"), *quoting State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). The state presented uncontradicted evidence Howard knew he had marijuana in his pocket when it was found by the officer. And, the only potential relevance of the prior arrest was to demonstrate Howard's knowledge of the marijuana "blunts" in the vehicle, which the jury ultimately concluded he had not possessed.

¶8 Howard nonetheless maintains the testimony about his "prior involvement in a drug case only served to prejudice the jury that [Howard] was perhaps a regular drug user." But the state presented uncontradicted evidence that Howard himself admitted smoking marijuana daily. Thus, any improper jury inference from the prior conviction that Howard was a regular marijuana user was comparatively trivial and cumulative to Howard's own admission and had no conceivable prejudicial impact on Howard's case. *See State v. Torres*, 127 Ariz. 309, 311-12, 620 P.2d 224, 226-27 (App. 1980) (error harmless when improperly admitted evidence merely cumulative); *see, e.g.*, *State v. Kemp*, 185 Ariz. 52, 61, 912 P.2d

1281, 1290 (1996) (harmless error when jury only learned minimal new information from evidence cumulative to properly admitted evidence).

¶9 Thus, assuming arguendo the trial court committed any error in admitting the evidence of Howard's prior offense to show his knowledge of the marijuana in the vehicle, that error did not affect the outcome of the case in light of the jury's ultimate conclusion that Howard did not possess the marijuana found there. *Cf. State v. Anderson*, 199 Ariz. 187, ¶ 33, 16 P.3d 214, 220 (App. 2000) (rejecting argument jury inflamed by prejudicial evidence of misdemeanor crimes when jury acquitted defendant of several more serious offenses); *State v. Barger*, 167 Ariz. 563, 567, 810 P.2d 191, 195 (App. 1990) (exclusion of statement harmless error when jury acquitted defendant of charge to which statement would have been relevant to justification defense); *State v. Davis*, 117 Ariz. 5, 8, 570 P.2d 776, 779 (App. 1977) (not prejudicial error when trial judge improperly communicated instruction to jurors on charge of which defendant acquitted).

¶10 Finding no reversible error, we affirm Howard's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge